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1. The Supreme Court of the United States has decided it is a violation of the due process clause that property of anyone should be taken without notice in any proceeding which must be accorded finality, while one Kentucky statute requires no notice at all to be given to the heir when a will (forged in this case) is probated, and another Kentucky statute makes the probate of a will conclusive, until annulled, so that any purchase of the real estate from the devisee, although it may be for a grossly inadequate consideration, is wholly beyond the reach of the heir who has had no notice, a definite finality as to him.

2. The Kentucky statutes in allowing an heir of an intestate estate notice of the petition for its probate, but denying any notice at all to a nonresident heir of a testate estate, deny to the latter heir the equal protection of the law and the privileges and immunities enjoyed by citizens of Kentucky.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. .....

LYNN CHASTAIN,
Petitioner and Plaintiff,
vs.

HENRY A. MCKINNEY; CHRISTINA D. MCKINNEY; FRITZ W. DRYBROUGH; MARION W. DRYBROUGH; BEN J. JOHNSON; TRINITY UNIVERSAL INSURANCE COMPANY; J. J. KAVANAGH; HERBERT H. MONSKY; FRANK R. CAHILL, JR.; H. KLEINMAN; LOUISVILLE TITLE INSURANCE COMPANY; LINCOLN BANK AND TRUST COMPANY; WATKINS COMPANY and NATIONAL LIFE & ACCIDENT INSURANCE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Lynn Chastain, respectfully prays that a writ of certiorari be issued out of and under the seal of this court to review the decision of the United States Court of Appeals for the Sixth Circuit, rendered on April 17, 1953, which sustained a summary judgment of the United States District Court for the Western District of Kentucky, and sustained motions to dismiss petitioner's complaint without trial, and from the order denying the petitioner's motion for rehearing which was accepted by the Circuit Court of Appeals for the Sixth Circuit, but denied on June 12, 1953.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred on this court by 28 *U.S.C.*, Sec. 1254 (1). The decision of the United States Court of Appeals was rendered April 17, 1953. The order extending the time to file a petition for rehearing was entered May 5, 1953, extending the time for filing petition to June 6, 1953; the order denying rehearing was filed June 12, 1953.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 203 Fed. (2nd) 712, and is also printed in the Appendix to this petition.

The opinion of the United States District Court for the Western District of Kentucky was entered November 16, 1951, and the judgment of said court granting summary judgment and motions to dismiss the complaint filed on December 5, 1951, is printed in the record (R. 164).

QUESTIONS PRESENTED

The questions presented by this petition are:

1. Where the devisee of real estate named in a forged will, which was probated upon an application filed by that devisee in which the name and address of the non-resident sole heir of deceased were stated, but no notice of the probate was given or required to be given the heir under Kentucky Act No. 167 of the Acts of 1942, and the devisee after the allowance of the will and before any notice of even the death of the deceased came to the said non-resident sole heir, conveyed the real estate for an alleged grossly inadequate consideration, is that statute together with the K. R. S. Sec. 394.130, which declares the probate of a will to be conclusive till annulled, except as to the jurisdiction of the court, unconstitutional, in view of the law recently stated in the case of *Mullane vs. Central Hanover Bank and Trust Company*, 339 U. S. 306, to the effect that a fundamental requirement of due process of law in any proceeding which is to be accorded finality is notice to interested parties and opportunity to present objections.

2. When the Kentucky statutes allow an heir of an intestate estate notice of the petition for its probate, but do not allow an heir of a testate estate any notice of its probate, is the latter heir denied the equal protection of the law?

3. Under the Kentucky statute allowing fifteen (15) years for the recovery of real estate, is not the plaintiff Chastain entitled to recover against the purchaser from the devisee under the forged will, his recovery not being barred by the above-mentioned statute making the probate of a will conclusive until annulled, except as to the jurisdiction of the court?

4. Although the courts below hold the controlling question to be whether or not Drybrough was a bona fide purchaser, was not summary judgment against the plaintiff erroneous in shutting out plaintiff's right to a trial on the merits to produce all the evidence he has to prove his well-pleaded allegations that Drybrough was not a bona fide purchaser, and therefore could not retain the property, even though the statute K. R. S. 394.130, makes the probate conclusive, except as to the jurisdiction of the court, until reversed or annulled.

STATUTES INVOLVED

The Kentucky statute making probate conclusive (K. R. S. 394.130) reads as follows:

> "No will shall be received in evidence until it has been allowed and admitted to record by a county court, and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until superseded, reversed or annulled."

The Kentucky statute (Sec. 5, 6 of Act No. 167 of the Acts of 1942; K. R. S. 394.145) provide for the procedure for probating testate and intestate estates, and are printed in the Appendix of this petition (Appendix p. 12).

The Kentucky Statute K. R. S. 413.010 (limiting the actions for recovery of real estate) reads as follows:

> "An action for the recovery of real property may be brought only within fifteen (15) years after the

right to institute it first accrued to the plaintiff, or to the person through whom he claims."

The Kentucky statute (K. R. S. 395.330), which validates sales of personal estate made by an executor or administrator, reads as follows:

> "Where an order of administration is set aside or letters of administration revoked, or where any executor or administrator is removed, or the will under which he acted is declared invalid, all the previous sales of personal estate made lawfully by the executor or administrator and with good faith on the part of the purchaser and all other lawful acts done by the executor or administrator, shall remain valid and effectual."

STATEMENT

The basis of this petition for certiorari is that in proceedings which must be accorded finality, the defendant Drybrough purchased from the devisee of a forged will all the real estate of a deceased, whose sole heir was non-resident plaintiff Chastain, without Chastain getting any notice of any probate proceedings or even of the death of the deceased.

The plaintiff Chastain, a resident of Detroit, Michigan, as nephew and sole heir to the real estate of a resident of Louisville, Kentucky, seeks in his complaint to set aside the conveyance of it made by defendant McKinney, the devisee under the forged will (R. 6). The will was probated August 7, 1942, in the Jefferson County Court, upon an application filed on that day by defendant McKinney and defendant Johnson (R. 8), and in that application the correct name and address of plaintiff Chastain in Detroit, Michigan, and his designation as the sole heir of the property were given (R. 134). No notice of any kind was given plaintiff Chastain of the probate (R. 8), and the first word he ever received of the death of his aunt and probate of the will was a letter from devisee McKinney dated November 9, 1942 (R. 135).

On September 2, 1942, twenty-six days after the probate of the will, defendant McKinney executed and delivered

to defendant Drybrough a deed to the real estate (R. 10), which was an apartment house, for the sale price of Fifteen Thousand Dollars, Thirteen Thousand Dollars of which was a mortgage which Drybrough agreed to assume, and on the same day the remaining Two Thousand Dollars were placed in escrow for the benefit of the liens of creditors and to "insure" Drybrough against loss (R. 23). Plaintiff Chastain in his complaint alleges that the property was valued at Fifty Thousand Dollars (R. 9), and the loss of income brings his damage to more than One Hundred Thousand Dollars (R. 17), and that defendant Drybrough was not a bona fide purchaser.

He was not permitted a trial to prove those allegations, the District Court granting summary judgment against plaintiff, holding that Drybrough was a bona fide purchaser by reason of the K. R. S. 394.130, making the probate of a will conclusive, except as to the jurisdiction of the court, until annulled (R. 156).

The Two Thousand Dollars that Drybrough paid on the purchase price were placed in escrow with the Louisville Title & Insurance Company to "insure said vendee (Drybrough) against loss or damage arising by reason of any such liens or claims, (potential liens in favor of the creditors of the estate and for inheritance taxes and specific monetary bequests mentioned in the will) (R. 23).

Drybrough and his grantor McKinney agreed in the escrow agreement that the property was "subject" to taxes, liens and bequests, and the Two Thousand Dollars were paid over to McKinney in accordance with the following stipulations (R. 23):

> "On January 27, 1943, the second party herein agrees to turn over said sum to the first party, provided no claims have been asserted against said money or against said property by creditors, taxing authorities, or recipients of specific bequests during said interim, and provided further that as a prerequisite to the right of the first party to receive said money, he shall produce a statement from the personal representative of said estate to the effect that at said time, or previously, all debts against said estate have been paid, including Inheritance Taxes, and specific monetary bequests made in said will."

The final settlement of the estate was filed July 25, 1949, but has never been confirmed, the estate still standing open and unsettled (139). Plaintiff received $1700.00 from the administrator. The final disposition of the inheritance taxes was not made until May, 1948 (R. 125). The Kentucky inheritance tax statute K. R. S. Sec. 140.070, divides all people into three classes with different tax rates, a nephew and one such as devisee McKinney falling into different classes.

After the sale of the apartment house to Drybrough on September 2, 1942, and after plaintiff Chastain first learned on November 9, 1942, of the probate of the will, he commenced suit to contest the will on December 8, 1942, in the Circuit Court for Jefferson County, Kentucky, and the will was declared a forgery by that court on June 3, 1943 (11), and that judgment was affirmed by the Court of Appeals of Kentucky on December 15, 1944, in *McKinney vs. Chastain*, 298 Ky. 833; 184 S. W. 2nd. 240 (R. 37).

It is the claim of plaintiff Chastain that the proceedings of the sale to Drybrough under the statute making the probate of the will conclusive must be accorded finality, in the loss to plaintiff Chastain of property worth Fifty Thousand Dollars, while the probate court goes on, after the will has been proven a forgery, to administer the Two Thousand Dollars remaining equity in the property and some personal property named in the will.

It is the plaintiff's claim that regardless of the right of recovery against the remaining defendants, regardless of the course of remaining proceedings taken in the probate court and regardless of whether probate of a will is in rem, the Kentucky laws above referred to have permitted Drybrough to get Chastain's property without due process of law, and that Chastain has a right under the Kentucky 15-year statute of limitations to commence suit to recover the real estate.

The District Court held that Drybrough was a bona fide purchaser by reason of K. R. S. 394.130, which declares the probate of a will conclusive, except as to the jurisdiction of the court, until superseded, reversed or annulled, and also by reason of K. R. S. 395.330, which declares that when a will is declared invalid, all previous

sales of personal estate made by an executor or administrator are valid.

The District Court also held that the statute allowing probate without notice to heirs does not violate the due process clause because the proceeding is in rem.

The District Court further held that the 15-year statute of limitations does not apply because Drybrough became a bona fide purchaser by reason of the statute making the probate conclusive.

The Court of Appeals said that the main question was whether the devisee has the power to sell devised real estate so as to convey a good title against subsequent annullment of the forged will and held that the devisee has such power under the K. R. S. 394.130, which makes the probate conclusive, and under K. R. S. 395.330, which makes sales of personal estate by an executor or administrator valid, and sustained the summary judgment.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred as follows:

(1). On the first question —

In holding that the Kentucky law does not violate the due process clause of the constitution in permitting a forger to present an application for probate of a will which contains the name and address of the sole heir to the property, but then giving no notice of any kind to the heir, grants the probate, and then in permitting the devisee of the real estate to give an indefeasible title to the property for a grossly inadequate consideration, so that the heir's loss of the greater part of the property becomes a finality right at that time.

(2). On the second question —

In failing to hold that the Kentucky statute denies plaintiff the equal protection of the law by granting notice of probate in an intestate estate to the heir but no notice at all in a testate estate.

(3). On the third question —

In holding that Drybrough, the purchaser from the devisee, was a bona fide purchaser so that the statute permitting commencement of actions for recovery of real estate within 15 years had no application.

(4). On the fourth question —
In rendering summary judgment and denying plaintiff the right to a trial on the merits to prove the well-pleaded allegations that Drybrough was not a bona fide purchaser.

REASONS RELIED ON FOR GRANTING THE WRIT

1. The Supreme Court of the United States declares it to be a violation of the due process clause that property of anyone should be taken without notice in any proceeding which must be accorded finality, while one Kentucky statute requires no notice at all to be given to the heir when a forged will is probated, and another Kentucky statute makes the probate of a will conclusive, so that any purchase of the real estate from the devisee, although it may be for a grossly inadequate consideration, is wholly beyond the reach of the heir who has had no notice, a definite finality as to him.

The two statutes, one permitting the probate of a will without notice to the heir, and the other making the probate of the will conclusive until annulled, except as to the jurisdiction of the court, combine absolutely in the case of a forged will to deprive an heir of his property, regardless of any construction we may give each of the two statutes when standing alone. We do not believe the Supreme Court of the United States in any of its decisions has intended such a result, and we prefer to believe that the one rule the court intended to govern our personal and property rights is stated in the case of *Mullane vs. Central Hanover Bank & Trust Co.*, 339 U. S. 306:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality, is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

2. The Kentucky statutes in allowing an heir of an intestate estate notice of the petition for its probate, but denying any notice at all to a non-resident heir of a testate estate, deny to the latter heir the equal protection of

the law and the privileges and immunities enjoyed by citizens of Kentucky.

LYNN CHASTAIN

By Harry J. Lippman,
Attorney for Plaintiff
and Appellant.
Business Address:
910 Majestic Building,
Detroit 26, Michigan.

John G. Cross,
Of Counsel.
614 Bankers-Equitable Bldg.,
600 Griswold Street,
Detroit 26, Michigan.

Dated at Detroit, Michigan, August 26, 1953.

STATE OF MICHIGAN
SS.
COUNTY OF WAYNE

On this 26th day of August, A.D. 1953 before me, a Notary Public in and for said County, personally appeared Harry J. Lippman to me known to be the same person described in and who did execute the foregoing petition and who did take oath and say that he did execute said petition on behalf of the appellant therein Lynn Chastain with full knowledge of all the facts therein set forth and with authority so to do and that all same is true of his own knowledge except as to matters therein stated to be upon information and belief and as to those matters he believes it to be true.

Benjamin Knoppon,
Notary Public, Wayne County, Michigan.
(SEAL) My commission expires Oct. 19, A.D. 1954.

(County Clerk Certificate of Notarial Authentication attached).

APPENDIX

THE FOLLOWING IS THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT

No. 11637

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LYNN CHASTAIN,
Appellant,
vs.
HENRY A. MCKINNEY, et al,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Decided April 17, 1953

Before Allen, Martin and Miller, Circuit Judges.

Per Curiam. On this appeal from an order of the district court rendering summary judgment in favor of certain of the defendants and sustaining the motions of other defendants to dismiss, the main question presented is whether under Kentucky law, the devisee under a will has the power to sell devised real estate so as to convey an indefeasible title against subsequent annullment of the will if proven to have been a forgery. The district judge held that, in such circumstances, the devisee can convey to an innocent purchaser for value, without notice, a good title to the devised property.

Section 394.130, *Kentucky Revised Statutes,* provides:

> "No will shall be received in evidence until it has been allowed and admitted to record by a county court; and its probate before such court shall be conclusive, except as to the jurisdiction of the court, until superseded, reversed or annulled."

The district judge pointed out in his succinct opinion that, in *Newbern vs. Leigh, Trustee,* 184 N. C. 166, 113 S. E. 674, a state statute similar to the foregoing statute had been construed to mean that the purchaser from the devisee without notice of the imperfections or irregularity in the will had the right to rely upon the statute irrespective of the possibility of the subsequent setting aside of the will. He quoted from the opinion, as follows:

> "If titles to real estate can be set aside by the attack on a will which constitutes a link in the chain of title, it would shake the very foundations of real estate titles, and the titles in which a will is a link would be always looked upon with doubt."

The district judge called attention to a decision of the Court of Appeals of Kentucky, *Geary vs. Runsey,* 30 Ky. Law. Rep. 86, promulgated some sixteen years before the announcement of the opinion in the North Carolina case, wherein the Kentucky court had held that devisees of land, as well as executors with power to sell, derive such power under the will as to place their conveyance beyond defeat by any subsequent annulment of the will, and that the title given by each is indefeasible, by any subsequent procedure annulling the will. The district court also cited *Kentucky Revised Statute* 395.330, relating to sales of personal property bequeathed under a will before the will is held invalid, wherein it is provided that all previous sales of personal estate made lawfully by the executor or administrator and with good faith on the part of the purchaser, and all other lawful acts done by the executor or the administrator, shall remain valid and effective.

The court quoted in its opinion from *Cates vs. Pentecost,* 241 Ky. 310, as follows:

> "It (K. R. S. 396.110) substitutes a personal liability of the heir or devisee for the benefit of the

creditors in lieu of the land disposed of by such heir or devisee. It does not forbid a sale, but implies that one might be made. It provides a limitation upon the common law rules."

We think the district court correctly entered summary judgment and sustained the motions to dismiss. We are in accord with the reasoning of the District Court in disposing of the other points made by appellant which it seems unnecessary to discuss.

The judgment of the district court is affirmed.

APPENDIX

The Kentucky statute providing for the procedure for probating testate and intestate estates, reads as follows:

Act No. 167 of K. C. A. 1942 (K. R. S. 394.145)

"Sec. 5. Application for Appointment of Fiduciary. Before being appointed as executor, administrator, curator or administrator with the will annexed, every person shall make and file in duplicate a written application under oath, which must state the names of the deceased's surviving spouse and all of his heirs at law or such are as known, their post office addresses, if known, the date of the death and also a statement in general terms as to what the estate consists of and the probable value of the personal and real estate and also a statement of any indebtedness owing by the applicant to the deceased. A duplicate copy of said application shall be mailed by the clerk to the Commissioner of Revenue of the State of Kentucky.

"In case of intestacy, if there be no surviving spouse, or if such spouse waives the right of appointment or is not qualified to act and does not nominate a suitable administrator and there are more than one resident heir at law entitled to the appointment, the Court shall thereupon appoint a time for hearing such application. Notice of such hearing shall be given to the surviving spouse and all known heirs of the deceased residing in the state, in the manner herein provided."

"Sec. 6. Application for Probate of Will. When any will is offered for probate, the court shall require a verified application to be filed by the person offering the same. Such application shall state the residence of the testator at the time of his death and such other facts as may be necessary to establish the jurisdiction of the court and the names, ages and post office addresses of the testator's surviving spouse and heirs at law, or such as are known. The application for probate and for appointment as executor or administrator with the will annexed may be combined in one application."

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 203 Fed. (2nd) 712, and is also printed in the appendix to this petition.

The opinion of the United States District Court for the Western District of Kentucky was entered November 16, 1951, and the judgment of said court granting summary judgment and motions to dismiss the complaint filed on December 5, 1951, are printed in the record (R. 164).

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred on this court by 28 U. S. C., Sec. 1254 (1). The decision of the United States Court of Appeals was rendered April 17, 1953. The order extending the time to file a petition for rehearing was entered May 5, 1953, extending the time for filing petition to June 6, 1953. The order denying rehearing was filed June 12, 1953.

STATEMENT OF THE CASE

The Statement of the Case appears in the petition at Pages 4-7, and in the interest of brevity, is not repeated here.

FIRST SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred in holding that the Kentucky law does not violate the due process clause of the constitution in permitting a forger to present an application for probate of a will which contains the name and address of the sole heir to the property, but then giving no notice of any kind to the heir, grants the probate, and then in permitting the devisee of the real estate to give an indefeasible title to the property for a grossly inadequate consideration, so that the heir's loss of the greater part of the property becomes a finality right at that time.

In support of this claim, petitioner contends the lower court disregarded the principles stated in the case of *Mul-*

lane vs. Central Hanover Bank & Trust Co., 339 U. S. 306.

This case questioned the constitutional sufficiency of notice to beneficiaries on judicial settlement of accounts by a trustee of a common trust fund established under the New York Banking law. The contention was that the statutory requirement of notice only by publication contravened requirements of the Fourteenth Amendment.

The trustee had on its books the names and addresses of the income beneficiaries represented by appellant, and the court found no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record address.

The court said (p. 314):

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections (citing cases). The notice must be of such nature as reasonably to convey the required information. * * * and it must afford a reasonable time for those interested to make their appearance (citing cases). * * * But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

This *Mullane* case furthermore indicates that full opportunity to be heard does not become unessential whether the proceedings be termed in rem or in personam, for the court said (p. 312):

> "Judicial proceedings to settle fiduciary accounts have been sometimes termed in rem, or more indefinitely quasi in rem, or more vaguely still, 'in the nature of a proceeding in rem.' It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both in rem and in personam. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a

classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, of the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon or how its court or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard."

It was a violation of natural justice that defendant McKinney should present his forged will for probate, giving no sort of notice whatever to plaintiff Chastain under the Kentucky law was giving him Chastain's property, then conveying it forever beyond Chastain's reach under the protection of the Kentucky statute which makes the probate conclusive. It is respectfully urged that the purchaser defendant Drybrough was chargeable with knowledg of the record of the probate proceedings, preventing him from becoming a bona fide purchaser, and that plaintiff Chastain should have been permitted to present all the proofs he had at the trial to show Drybrough was not a bona fide purchaser. The court below rested its opinion upon the conclusion that Drybrough was a bona fide purchaser by reason of the statute making the probate conclusive, except as to the jurisdiction of the court, thereby depriving plaintiff of this property without due process of law.

SECOND SPECIFICATION OF ERRORS

The Court of Appeals erred in failing to hold that the Kentucky statute denies plaintiff the equal protection of the law by granting notice of probate in an intestate estate to the heir but no notice at all in a testate estate.

We do not find cases where this combination of statutes has been before the court for adjudication. There are many decisions bearing upon the differences in the statutes and regulations of service of process on residents and non-residents, but none approving lack of notice similar to the circumstances of this case before a devisee conveys away a non-resident's property. We believe the Kentucky law discriminates unjustly against the plaintiff as heir to an estate, not on terms of equality with resident heirs who naturally belong to the same class. If there is no real difference between persons and property as in this case, the state laws should not be permitted to make one in favor of some person.

THIRD SPECIFICATION OF ERRORS

The court erred in holding that Drybrough, the purchaser from the devisee, was a bona fide purchaser, so that the statute permitting commencement of actions for recovery of real estate within 15 years had no application.

The deal between the devisee McKinney who procured the probate of the forged will and Drybrough who purchased from him for a grossly inadequate consideration, both without any notice to plaintiff Chastain and both before plaintiff could possibly get a court decree declaring the will a forgery, should not be protected by state statutes making such a deal bona fide.

If therefore Drybrough was something less than a bona fide purchaser, the plaintiff should be permitted to bring suit against him as sole heir to the estate at any time within the 15 years permitted by the Kentucky statute of limitations for the recovery of real estate, K.R.S. 413.010.

The parties themselves to that deal recognized the inconclusiveness of the purchase, as may be seen from the terms of the escrow agreement. This agreement "insured" Drybrough against loss, and made the purchase "subject" to something, was conditional, was dependent upon determination of inheritance taxes. The inheritance taxes could not be determined until it became known, on December 15, 1944, after the decision of the Court of Appeals of Kentucky declaring the will a forgery, whether the property should go to the plaintiff nephew or the devisee, because the Kentucky inheritance statute, K.R.S. 140.070, divides all per-

for summary judgment the court must "take against the moving party every question as to which there is the least doubt."

RELIEF SOUGHT

The decision of the United States Court of Appeals for the Sixth Circuit affirming a summary judgment of the United States District Court for the Western District of Kentucky and affirming motions to dismiss the complaint should be reversed and the Writ of Certiorari as prayed for in the application here filed should issue, in order that all matters involved may be properly presented to this court.

Respectfully submitted,

Harry J. Lippman,
Attorney for Plaintiff
and Appellant.
Business Address:
910 Majestic Building,
Detroit 26, Michigan.

John G. Cross,
Of Counsel.
614 Bankers-Equitable Bldg.,
Detroit 26, Michigan.

Dated at Detroit, Michigan,
August 26, 1953.

OCT 8 1953
HAROLD B. WILLEY, Cl

Supreme Court of the United States

October Term, 1953.

No. 305.

LYNN CHASTAIN, - - - - - - Petitioner,

versus

HENRY A. McKINNEY, CHRISTINA D. McKINNEY, FRITZ W. DRYBROUGH, MARION W. DRYBROUGH, BEN J. JOHNSON, TRINITY UNIVERSAL INSURANCE COMPANY, J. J. KAVANAGH, HERBERT H. MONSKY, FRANK R. CAHILL, JR., H. KLEINMAN, LOUISVILLE TITLE INSURANCE COMPANY, LINCOLN BANK AND TRUST COMPANY, WATKINS COMPANY and NATIONAL LIFE & ACCIDENT INSURANCE COMPANY, - - - - - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

CHAS. E. KELLER,
Marion E. Taylor Bldg.,
Louisville, Ky.,
Counsel for J. J. Kavanagh, Henry A. McKinney and Christina D. McKinney.

J. WALTER CLEMENTS,
Marion E. Taylor Bldg.,
Louisville, Ky.,
Counsel for Trinity Universal Insurance Company.

HERBERT H. MONSKY,
829 W. Broadway,
Louisville, Ky.,
Counsel for Frank R. Cahill, Jr., Hyman Kleinman and Herbert H. Monsky.

LEO T. WOLFORD,
501 S. Second St.,
Louisville, Ky.,
Counsel for Louisville Title Insurance Company, Ben J. Johnson, Fritz W. Drybrough, Marion Drybrough and National Life & Accident Insurance Company.

MIDDLETON, SEELBACH, WOLFORD, WILLIS & COCHRAN,
Of Counsel.

September 28, 1953.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1953.

No. 305

LYNN CHASTAIN, - - - - - *Petitioner,*

v.

HENRY A. MCKINNEY, CHRISTINA D. MCKINNEY, FRITZ W. DRYBROUGH, MARION W. DRYBROUGH, BEN J. JOHNSON, TRINITY UNIVERSAL INSURANCE COMPANY, J. J. KAVANAGH, HERBERT H. MONSKY, FRANK R. CAHILL, JR., H. KLEINMAN, LOUISVILLE TITLE INSURANCE COMPANY, LINCOLN BANK AND TRUST COMPANY, WATKINS COMPANY AND NATIONAL LIFE & ACCIDENT INSURANCE COMPANY, - *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinions Below.

The opinion of the District Court (R. 156-163) filed November 16, 1951, is not officially reported. The opinion of the Court of Appeals for the Sixth Circuit handed down April 17, 1953, filed as an Appendix to the Petition (pp. 10-12), is reported at 203 F. 2d 712.

Jurisdiction.

The jurisdiction requisites are adequately set forth in the Petition.

Questions Presented.

Whether the Kentucky law, which permits the probate of a will as an action *quas in rem,* "in the common form," without notice to the heirs-at-law, but with the right of appeal within five years and a trial *de novo,* and which provides that the probate thereof "shall be conclusive except as to the jurisdiction of the court, until superseded, reversed or annulled" violates the due process of law or the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Statutes Involved.

The pertinent provisions of the Kentucky Statutes involved (K.R.S. 394.130; K.R.S. 395.330 and K.R.S. 394.145) are set forth in the Petition (pp. 3-4, 12-13). In addition, there is involved K.R.S. 413.120, which provides:

> "The following actions shall be commenced within five years after the cause of action accrued: * * *
>
> "(12) An action for relief or damages on the ground of fraud or mistake", * * *

and K.R.S. 413.140, which provides:

> "The following actions shall be commended within one year after the cause of action accrued: * * *
>
> "(c) An action for * * * conspiracy * * *."

STATEMENT.

Within less than a month before her death, Anna DeVault bought from a Louisville bank some real estate in Louisville for $15,000 (R. 62-3, 67-8). After the probate of what purported to be her last will, and before any attack was made as to its validity, the residuary legatee and devisee (R. 80) sold the property for $15,000 (R. 63-4, 81-2). This was almost the identical appraised value by the court appraisers (R. 64, 91-2). Thereafter, an appeal was taken from the order of probate and the will was set aside (R. 11, 14).

The Petitioner, in his sworn statement for the appointment of an administrator *de bonus non,* valued the property at the price at which it had been sold by the devisee under the will (R. 65, 105-6).

The Petitioner has received the entire purchase price paid by the purchaser from the devisee under the will, except such part as has been used to pay debts of the deceased and the costs of administration (R. 126).

Seven and one-half years after the sale by the devisee under the will, the Petitioner brought this suit against the residuary legatee who had made the sale, the purchaser, the two personal representatives and their sureties, the Title Insurance Company, which had issued a real estate title insurance policy to the purchaser, and others, to have the sale set aside.

The devisee under the will received nothing for himself as the entire purchase price was paid to the Administrator (R. 64-5, 103-4).

The final settlement of the Administrator *de bonus non* has not been confirmed. Exceptions have been filed and the matter is still pending in the Probate Court (R. 131, 139).

The District Court held there was no sufficient allegation of fraud under rule 9(b) of the Rules of Civil Procedure; that the purchaser from the devisee under the will was a bone-fide purchaser for value without notice; and that the sale was valid under the Kentucky law (R. 158-163).

The Court of Appeals affirmed (*Chastain* v. *McKinney,* 203 F. 2d 712).

ARGUMENT.

It is well established under Kentucky real estate law that a devisee under a probated will may transfer a good title to a *bona fide* purchaser which is not affected by the later setting aside of the will (K.R.S. 394.130, 395.330; *Geary* v. *Rumsey,* 30 Ky. L. R. 86, 97 S. W. 400). This is the prevailing rule (*Newbern* v. *Leigh,* 184 N. C. 166, 113 S. E. 674, 26 A. L. R. 266, 270n; *Davis* v. *Gaines,* 104 U. S. 386; *Foulke* v. *Zimmerman,* 14 Wall. 113).

If this were not the law, a great many titles acquired through decedents' estates would be void; and no real estate of a decedent could safely be sold without awaiting the five-year period allowed for the appeal from the order probating the will.

The case presents other meritorious arguments on behalf of the Respondents which show that the deci-

sions below are correct without regard to the questions sought to be raised by the Petition. As a result, this Court would not likely reach the point of alleged importance or conflict in any event.

(a) Exceptions have been filed and the estate has not been settled, but is still pending in the Probate Court. It is well established that the Federal courts will not seize property out of the possession of the State court and take over the settlement of an estate as that is a matter within the State court's jurisdiction (*Spears* v. *Spears,* 162 F. 2d 345, 349 (C.A. 6); *Farrell* v. *O'Brien,* 199 U. S. 89, 110-11, 118).

(*b*) The Petitioner received the full proceeds of the sale from the Administrator and has thereby ratified the sale (*supra,* p. 3).

(*c*) Limitations had clearly run under the State law for any recovery on account of alleged conspiracy or fraud (K.R.S. 413.120(12) and K.R.S. 413.140(c). Since jurisdiction is based on diversity of citizenship, the Kentucky statute of limitations applies (*Guaranty Tr. Co.* v. *York,* 326 U. S. 99; *Cope* v. *Anderson,* 331 U. S. 461).

(*d*) There are no sufficient allegations of fraud in the complaint (R. 6-18, 158; Rules of Civil Procedure 9(b)).

I.

There is no conflict of decision.

The Petitioner contends that the Kentucky procedure for probating a will as an action *quasi in rem,* without previous notice to the heirs-at-law but with the right on their part to appeal at any time within five years and have a trial *de novo,* violates the due process clause of the Fourteenth Amendment to the United States Constitution.

Actual notice to the heirs-at-law has never been required in Kentucky (*Miller* v. *Hill,* 293 Ky. 242, 247, 168 S. W. 2d 769). However, the Petitioner learned of the probate of the will shortly thereafter, and appealed therefrom (R. 11, 25), and succeeded in having the Court hold the will to be invalid. He did not contend that the probate of the will was void, but that the will itself was void.

He relies solely upon *Mullane* v. *Cen. Hanover Tr. Co.,* 339 U. S. 306, which we contend is clearly not in point.

In the *Mullane* case, a New York Trust Company, which was trustee of a common trust fund, held for many beneficiaries, sought a judicial settlement of its accounts as trustee, including allowances. No notice was given except by newspaper publication. That notice was held insufficient. The Court said the Trust Company had dealt with all the beneficiaries and knew their names so that a better notice was easily available.

It said that the judicial settlement would be "binding and conclusive" as to all matters, and that the

rights of the beneficiaries against the Trust Company for improper management would be "sealed and wholly terminated by the decree" It said proceedings which are to be accorded finality should be conducted only after notice "with due regard for the practicalities and peculiarities of the case." The Court said (p. 317) that it was not unreasonable for the State to dispense with more certain notice to beneficiaries whose interests are either "conjectural or future."

Manifestly, that case dealt with an entirely different situation from what we have here. The Petitioner's interest here arose from the invalidity of the will which could not be assumed. Moreover, he was not deprived of an opportunity to be heard, but had a right to appeal within five years, and he exercised that right. The *Mullane* case could not be an authority for holding that the probate of a will is invalid unless there is prior notice to everybody who might attack the will. In fact, he could not attack it by circuit court action with a jury trial until the will was first probated.

1. The Kentucky law which permits wills to be probated by a *quasi in rem* action, is the law in many other States (68 C. J. 961, 2 Page on Wills, 124, 26 A. L. R. 270).

As said in *Spears* v. *Spears,* 162 F. 2d 345, 349 (C. A. 6):

> "If a state statute authorizes the probating of wills *ex parte,* and authorizes a suit by an interested party to contest the probate or to establish

> the right to probate where probate has been denied, and such a suit is filed, it is merely a continuation of the probate proceedings and not an independent proceeding *inter partes* of which the Federal Court has jurisdiction."

To the same effect, is *Farrell* v. *O'Brien,* 199 U. S. 89, 91, 100, 103, 106, 111, 117-18.

2. Historically, proceedings for the probate of wills originated in the Ecclesiastical Courts. Under the Ecclesiastical law a will could be probated "in the solemn form" by bringing in all of the interested parties, but they were more commonly probated "in the common form," which was purely *ex parte.* Probate "in the common form" required the presence of only the witnesses who attested the will (68 C. J. 897; 2 Page on Wills, 44, 52). As said in 2 Page on Wills, 44:

> "Under the original procedure at Ecclesiastical law, and wherever such procedure has been perpetuated by modern legislation, there are no adversary parties, although the different claimants may intervene; and the order admitting the testament to probate usually is binding upon all the world."

Thus, it is clear that before the Constitution was adopted, the ordinary procedure for probating wills was *ex parte* and that method is still followed in Kentucky and many other States.

3. The decision in the *Mullane* case is based primarily on the fact that the decree settling the trustee's accounts in that case settles "all questions respecting

the management of the common fund," and that the right of beneficiaries to raise any objection to the accounting "is sealed and wholly terminated by the decree." The New York procedure was disapproved only because the proceeding thereby deprived the beneficiaries of their property without any opportunity for a hearing at any time.

A proceeding for the *ex parte* probate of a will is entirely different. In Kentucky any interested party may within five years appeal from an order of probate and have the case tried *de novo* in the circuit court (K.R.S. 394.240; *Anderson's Adm'x* v. *Bourbon Agr. Bank,* 265 Ky. 157, 161, 96 S. W. 2d 257; 2 Page on Wills, 293).

Thus, there is a very great difference between the final accounting of the trustee involved in the Mullane case, which had the effect of *finally* adjudicating the rights of the beneficiaries on the one hand, and the historically *ex parte* proceeding for the probate of a will with a right of appeal and a *de novo* trial on the other hand.

In the first place, as pointed out in *Crippen* v. *Dexter,* 13 Gray (Mass.) 330, it is not unreasonable to probate a will without notice since a man who dies owning property usually dies within the knowledge of his kindred, and the death itself is a fact of some notoriety, at least, in the circle of his associates and family. Proceedings for the settlement of his estate of necessity soon follow, and may be easily known to those most interested, so that actual knowledge of the proceedings will generally be had.

In the second place, all interested parties are given five years within which to appeal and try the whole matter *de novo* so that they are not denied a hearing.

In fact, the probate of a will of a deceased is somewhat similar to filing a deed of record. Whether or not there is any dispute as to the validity of a will, the testament must be probated (2 Page on Wills, 44). When a will is probated the executor who received the property is required to give some security so that any existing errors may later be corrected. The statutes provide that the courts may require a will to be filed (K.R.S. 394.160) and it cannot be proved until it is filed (K.R.S. 394.130). In order to avoid lost wills it is important that a will of a decedent be produced and filed for probate promptly.

4. The provision for a trial *de novo* satisfies due process. As said in 16 C. J. S. 1254:

> "Where there is proper provision for hearing by review, it is not a denial of due process to permit entry of a judgment without notice * * *."

That question was directly presented in *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 168. A surety on a supersedeas bond complained of the State procedure which permitted judgment to be rendered on the supersedeas bond without notice. The Court, holding that the right to a subsequent hearing was sufficient, said:

> "The state practice provided the opportunity for such a hearing by an appeal after the entry of judgment.

"The practice prescribed was constitutional. Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment."

5. Many analogies in the law support the conclusion that a hearing is not required to be given in advance where impracticable. It will be sufficient to mention two instances.

(*a*) In proceeding for eminent domain, it is settled that the Fourteenth Amendment does not require a hearing in advance if the land owner can later come in and secure a hearing (*Barker* v. *Lannert,* 310 Ky. 843, 850, 222 S. W. 2d 659; *Bailey* v. *Anderson,* 326 U. S. 203, 205).

In the latter case, the Court said:

"But it has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken."

(*b*) The Kentucky escheat statute provides that any person whose property is escheated to the State without notice to him and who was not actually served with notice, may within five years file his claim with the State for a refund. This was upheld in *Anderson Nat'l Bank* v. *Reeves,* 293 Ky. 735, 738, 741, 170 S. W. 2d 350. On appeal to the United States Supreme Court, the Kentucky statute was again upheld (*Ander-*

son Nat'l Bank v. *Luckett,* 321 U. S. 233, 242-7). The statute provides that the sheriff shall post at the courthouse door or on the bulletin board, a copy of the bank's report of deposits presumed to be abandoned. The Court said that this, together with the provision of the statute itself, afforded sufficient notice (pp. 243-4). The Court said (pp. 246-7):

> "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled. Measured by this standard, we cannot say that the present notice is insufficient.
>
> "For this reason also it is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights, which, by later resort to the courts, secure to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process. Familiar examples are the decisions and orders of administrative agencies which determine rights subject to a subsequent judicial review."

Since the question raised affects many thousands of real estate titles in Kentucky and elsewhere, we have thought it necessary to deal at some length in demonstrating that the decision in the Mullane case cannot apply to *ex parte* proceedings for the probate of wills. The Court in the Mullane opinion would certainly have made some reference to *Farrell* v. *O'Brien,* 199 U. S.

89, if it had intended to hold invalid this ancient procedure.

In his second Specification of Error, the Petitioner contends that the Kentucky procedure violates the equal protection clause of the Fourteenth Amendment. He cites no authorities. This point was not raised in either of the lower Courts, and we submit it is without merit.

II.

The decision below is clearly correct and there is no important question of Federal law.

The probate of wills "in the common form" is a procedure which has always been in effect in Kentucky. It prevails in most states. This procedure existed long before the Constitution was written. If that procedure is held to be void, countless real estate titles in many states would be adversely affected.

The lower Courts properly held that under Rule 9(b) of the Rules of Civil Procedure, the Petitioner failed to make out any case of fraud, and in fact, none of the parties except the residuary legatee, who made the sale, could have been guilty of fraud in probating the will because the other parties had no relation to the case until after the will was probated. It was not shown that the legatee under the will forged the will or that he knew of the forgery when the will was offered for probate. He received no part of the proceeds, but the full purchase price was paid into the estate. If the Petitioner has any claim against this

residuary legatee, that matter is pending in the Probate Court, and can be there determined on the exceptions which have been filed to the final settlement.

Either the one year or the five year statute of limitations was applicable, and the Petitioner waited more than five years to bring his suit.

The existence of the escrow agreement between the seller and the Louisville Title Insurance Company whereby a part of the purchase price was temporarily held for the payment of tax claims against the estate, could not have prevented the purchaser from being a bona fide purchaser for value as he was not a party to that agreement and he had unconditionally paid the purchase price (*Winlock* v. *Munday,* 156 Ky. 806, 162 S. W. 76; *Fuller* v. *Peabody,* 1 F. 2d 965 (C. A. 6)).

Since there was no sufficient allegation of fraud, the whole case rested on documentary evidence which was before the Court and summary judgment was proper.

CONCLUSION.

The Petition for a Writ of Certiorari should be denied.

CHAS E. KELLER,
Marion E. Taylor Bldg.,
Louisville, Ky.,
Counsel for J. J. Kavanagh, Henry A. McKinney and Christina D. McKinney.

J. WALTER CLEMENTS,
Marion E. Taylor Bldg.,
Louisville, Ky.,
Counsel for Trinity Universal Insurance Company.

HERBERT H. MONSKY,
829 W. Broadway,
Louisville, Ky.,
Counsel for Frank R. Cahill, Jr., Hyman Kleinman and Herbert H. Monsky.

LEO T. WOLFORD,
501 S. Second St.,
Louisville, Ky.,
Counsel for Louisville Title Insurance Company, Ben J. Johnson, Fritz W. Drybrough, Marion Drybrough and National Life & Accident Insurance Company.

MIDDLETON, SEELBACH, WOLFORD,
WILLIS & COCHRAN,
Of Counsel.

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